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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 568

ROBERT G. LASSITER,

Petitioner,

vs.

A. H. POWELL, R. R. HERRING, E. N. CLEMENT AND JOHN S. WATKINS, TRUSTEES FOR THE CREDITORS AND STOCKHOLDERS OF THE FIRST NATIONAL BANK OF GRANVILLE,

Respondents.

BRIEF FOR RESPONDENTS

The Petition for Writ of Certiorari in this case must be denied unless it appears that the Circuit Court of Appeals for the Fourth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

This case was tried before Gilliam, District Judge, without a jury, from whose judgment the petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit. The Circuit Court of Appeals did not disturb the findings of fact of the lower Court and affirmed the lower Court's judgment.

The petition for Writ of Certiorari contains no exceptions or objections to the findings of fact by the trial Court, but the

petitioner in his Petition contends that the conclusions of law reached by the trial Court and the judgment rendered by the trial Court and affirmed by the Circuit Court are in error and should be reversed.

Three notes signed by the petitioner are frequently mentioned throughout the record in this case. Two of these notes, one dated November 25, 1932, for $15,500.00, payable in ninety days, and another note dated February 11, 1933, for $1000.00, payable in sixty days, are the notes in suit. A third note, dated August 21, 1933, in the sum of $15,500.00, is referred to as the compromise note.

The petitioner's contention is that the so-called compromise note was given and accepted in discharge and settlement of the notes in suit, but the petitioner does not contend that he has paid the notes in suit or the so-called compromise note.

The so-called compromise note was transmitted by the petitioner to the First National Bank of Granville, the respondents' predecessor in title to the two notes in suit, with petitioner's letter of August 30, 1933, which appears on pages 6 and 7 of the petition. Also transmitted by said letter was a bond of the Consolidated Indemnity & Insurance Company, purportedly guaranteeing the petitioner's note of August 21, 1933.

The aforementioned letter, together with the aforementioned note and bond, reached the First National Bank of Granville while its affairs were under the control of J. W. Medford, Conservator, who had theretofore been appointed as such Conservator by the Comptroller of the Currency.

The following quotations from the petitioner's said letter unmistakably indicate that the petitioner was making an offer: "With further reference to my conversation with you relative to my notes I wish to advise as follows", and "I am authorized by the Consolidated Insurance & Indemnity Company to offer you my note in the sum of $15,500.00, guaranteed by that

Company, in settlement of all of the notes signed by me, which you now hold".

Medford, as Conservator, was vested with the powers and charged with the duties outlined in and prescribed by U. S. Code, Title 12, Sections 192 and 203.

It is respectfully submitted that Medford, as Conservator, had no power or authority to accept the petitioner's said note in compromise and settlement of petitioner's then obtaining obligations to said Bank, and even though Medford, as Conservator, retained said so-called compromise note, his retention of the same did not constitute an acceptance.

"It is well settled that the plea of payment is an affirmative one and the burden of showing payment is on the one, who relies on same. The burden of proof is a substantial right".

Furst vs. Taylor,
204 N. C., page 603;

Davis vs. Dockery,
209 N. C., page 272.

"It is a fundamental rule of evidence that the burden is on the party, who asserts the affirmative of the issue".

Stein vs. Levins,
205 N. C., page 302.

It is obvious that the petitioner knew at the time of the writing of his letter of August 30, 1933, to the First National Bank of Granville, that its affairs were in the hands of Medford, as Conservator. His letter is thus addressed: "First National Bank of Granville, Oxford, N. C., Attention: Mr. J. W. Medford, Conservator."

The petitioner cannot escape the legal principle that he, the

petitioner, was presumed to know what power and authority Medford, as Conservator, enjoyed.

On or about December 19, 1933, the First National Bank of Granville, which had been restored to solvency, conveyed, made over and assigned a part of its assets to the respondents for liquidation for the benefit of waiving depositors and stockholders, and its remaining assets to a newly formed bank, the Oxford National Bank. A list or schedule of the assets passing to respondents contained the notes in suit and other notes of the petitioner, but did not contain the so-called compromise note. (R. p. 174). However, on or shortly after December 19, 1933, said so-called compromise note and the bond referred to in petitioner's letter of August 30, 1933, and said letter came into the possession of respondents, but it appears that the respondents did not see and did not have knowledge of said letter until in the early part of 1944, when it was found by R. R. Herring, one of the respondents. (Findings of Fact 15, R. p. 265.)

The following appears in Conclusions of Law, Paragraph 2, R. P., 275:

"It is true that the defendant's letter of August 30, 1933, was among the papers and records in the custody of the plaintiffs for a considerable length of time, but it does not appear that the plaintiffs as a board or body of trustees had actual knowledge of the existence of the letter during this period. Mr. Powell, one of the plaintiffs, knew about the plan and had agreed to it, but he does not constitute the body or board of trustees. Evidence shows that Mr. R. R. Herring, the Vice Chairman of the plaintiffs, saw the letter for the first time in the early part of 1944 and there is no evidence that any of the other plaintiffs ever had actual notice of its existence".

Respondents respectfully submit that J. W. Medford, as Conservator, could not have passed on to the First National Bank of Granville any title to the so-called compromise note, nor

could the said Bank, even if it had undertaken to do so, on December 19, 1933, have passed on to the respondents a good title to said note.

From time to time after December 19, 1933, the respondents made demands upon the petitioner for the payment of the two notes in suit, and this the petitioner admits in his answer (Par. 16, R. p. 10), and the petitioner admits (R. p. 87) that no demand was ever made on him for payment of the so-called compromise note.

The petitioner contends, however, that the respondents exercised such dominion over the so-called compromise note as to constitute in law an acceptance of said note. This contention the petitioner predicates upon the terms and provisions of the assignment by respondents of the two notes in suit and the so-called compromise note to the Liquidator of the Consolidated Indemnity & Insurance Company by instrument dated February 8, 1937, which appears on R. p. 263.

The trial Court found that said claim was proved under circumstances described as follows: "This claim was proved with the Liquidator of the Consolidated Indemnity & Insurance Company for the benefit of the defendant, who requested and urged plaintiffs to do so". (R. p. 263.)

In further connection with the filing and proof of this claim the trial Court finds (R. p. p. 263 and 264) "the notes in suit and the alleged compromise note were delivered to the Liquidator of the Consolidated Indemnity & Insurance Company, and were assigned by separate paper-writing as set out, but they were not actually endorsed by the plaintiffs, or any one of them, or by any one else for them".

In connection with the filing and proof of said claim the trial Court made this further finding of fact, (Par. 14, R. p. p. 264 and 265) "Before February 8, 1937, the date on which plaintiffs' claim against the Consolidated Indemnity & Insurance Company was filed and the notes transferred, as well as subsequent to

April 11, 1944, the date of the reassignment, plaintiffs made frequent demands, both oral and in writing, upon the defendant for payment of the notes in suit, but the defendant has made no payment thereon. Demand for payment of the alleged compromise note of $15,500.00 has at no time been made by the plaintiffs or their predecessors in title, nor by any other person in their behalf, and at the trial plaintiffs stated for the record that they make no claim thereon".

In connection with the filing and proof of said claim the trial Court made other important and significant findings, appearing in paragraphs 22, 23 and 24 of "Findings of Fact", (R. p. p. 267 and 268.), which are not quoted, but the respondents urgently call the Court's attention to these paragraphs.

It is respectfully submitted that the petitioner, having requested the respondents to file claim with the Liquidator of the Consolidated Indemnity & Insurance Company, and which, according to the findings of fact, was for petitioner's benefit, should not now be permitted successfully to complain of what the respondents were required by said Liquidator to do in connection with the filing of proof of said claim.

The petitioner further contends that the language of the bond transmitted by the petitioner's said letter of August 30, 1933, was such as to impose on respondents the duty of making a thorough and careful investigation, and that the respondents are legally bound by all disclosures, which such an investigation would have revealed.

Respondents submit that the petitioner's so-called compromise note and said bond and petitioner's said letter of August 30, 1933, were dependent each upon the other to convey or to communicate the petitioner's offer. The letter unfortunately was misplaced and its contents did not come to the attention of the respondents until in the early spring of 1944, at which time the two notes in suit and the so-called compromise note had been lost, through no fault of the respondents.

The cases relied upon by the petitioner in support of this contention are readily distinguishable from the instant case. In the instant case there is no evidence or proof that the respondents were careless or negligent, or that they acted in disregard of what could or should have been apparent to them. On the contrary the petitioner never lost sight of his said letter of August 30, 1933. In fact, R. R. Herring's, one of the respondents, successful search for said letter made during the spring of 1944, was made in consequence of a suggestion made during negotiations with the petitioner in 1944 for a settlement of petitioner's obligations to respondents. Such appears from the questions and answers of the witness, R. R. Herring, appearing on page 11 of the petition for Writ of Certiorari.

It is respectfully submitted that it would be inequitable indeed if the respondents, who had indulged the petitioner from December 19, 1933, until February 8, 1937, and who on said February 8, 1937, filed and proved a claim on the notes in suit with the Liquidator of the Consolidated Indemnity & Insurance Company at the petitioner's request and for the petitioner's benefit, should now be defeated in their suit against the petitioner because of the failure on the part of the respondents to discover the said letter written by petitioner dated August 30, 1933, of which said letter it is apparent that the petitioner at all times knew, but did not disclose until during the negotiations for settlement carried on between respondents and petitioner during the spring of 1944.

The carefully considered and able opinion of the Circuit Court of Appeals in this case clearly indicates that this case has been decided in accordance with applicable local decisions, and said opinion contains references to controlling Statutes and North Carolina opinions, a repetition of which in this Brief is not deemed necessary.

The respondents respectfully submit that there is no merit

in petitioner's petition and respectfully urge the Court to deny said petition.

Respectfully submitted,

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